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04-1330

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BERNADETTE FULLER,

Petitioner,

—v.—

INSTINET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did former Federal Rule of Civil Procedure 23(e), as it existed prior to the December 1, 2003 amendment, require that notice of the denial of class certification be given to members of the rejected class?

2. Was it an abuse of discretion to hold that a statistical study of Black, Hispanic, and White employees' salaries and distribution across occupational groups lacked probative value in demonstrating the existence of an aggrieved class of Blacks and Hispanics because it failed to take into account any potentially relevant non-discriminatory variables?

3. Does 42 U.S.C. § 1981(c) eliminate the necessity of proving an adverse employment action to sustain a retaliation claim under Section 1981?

CORPORATE DISCLOSURE STATEMENT

Instinet, LLC (misnamed in this action as "Instinet, Inc.") is a wholly owned subsidiary of Instinet Group Incorporated. Instinet Group Incorporated, in turn, is a public company that is approximately 63% owned by a wholly owned subsidiary of Reuters Group PLC, a public company listed on the London Stock Exchange and the NASDAQ exchanges.

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STATUTORY PROVISIONS INVOLVED

Former Federal Rule of Civil Procedure 23(e) (prior to December 1, 2003)

Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Current Federal Rule of Civil Procedure 23(e) (effective December 1, 2003)

Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every

State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

COUNTER-STATEMENT OF THE CASE

Respondent Instinet LLC (misnamed in this action as "Instinet, Inc.") is an electronic agency securities broker. Petitioner Bernadette Fuller is a Black former Instinet employee who was hired in June 1994 as a marketing specialist. Three years later, Fuller successfully transferred to a position as a trading research analyst. In August 1999, Fuller precipitously quit her job three days after receiving a "Meets Job Requirements" performance review and an accompanying bonus award. She left Instinet because she purportedly perceived the review as extremely negative and supposedly considered herself "constructively discharged."

Shortly after Fuller's resignation, she commenced this action against Instinet. She alleged that she had experienced racial discrimination and harassment and retaliation at Instinet and, moreover, that there was a pattern and practice of racial discrimination and harassment and retaliation at Instinet. She asserted her claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"); Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981 ("Section 1981"); and the New York Human Rights Law, N.Y. Exec. Law § 296.

Fuller sought to pursue her disparate treatment case as a sweeping class action on behalf of "All blacks and Hispanics and other minorities" who were employed by Instinet at any time from 1995 forward. In September 2000, after full discovery, Fuller moved for class certification. In support of her motion, Fuller submitted the "Expert Report of Richard Faust" (the "Report") that purportedly showed racial discrimination in job placement and in some salaries at Instinet. The Report described differences in the distribution of Blacks and Hispanics, as compared to Whites, across EEO-1 occu-

pational groups and in the salaries of Blacks and Hispanics, as compared to Whites, in certain job categories and then assumed that race was the cause of the observed disparities. The Report stated, "In this case, since race is the source of the disparities, statistical significance would indicate that race, not accident or chance, was indeed the source." The statistical analyses set forth in the Report did not identify or control for *any* of the major non-discriminatory factors, such as education, length of service, work experience, or make-up of the applicant pool, that would be expected to affect salary and representation in particular occupational groups.

The District Court and the Second Circuit both held that the failure to include any relevant non-discriminatory factors in the statistical study rendered it fatally flawed and lacking in probative value with regard to demonstrating the existence of an aggrieved class of Blacks and Hispanics that had shared the same injury that Fuller alleged. On this ground, the District Court ruled that Fuller had not satisfied the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a) and denied her motion for class certification. The Second Circuit affirmed.

Ten months after the District Court's denial of class certification, at the time set for dispositive motions, Fuller moved for an order compelling Instinet to provide the names and addresses of all past and present Instinet employees who would have been members of her rejected class so that they could be given notice of the denial of class certification and the opportunity to pursue individual claims against Instinet. She asserted that such notice was required by Rule 23(e), as it then existed. At the same time, Instinet moved for summary judgment on each of Fuller's claims.

The District Court denied Fuller's motion to compel and granted Instinet's motion for summary judgment on all of Fuller's claims. The Second Circuit affirmed the denial of Fuller's motion to compel, holding that former Federal Rule of Civil Procedure 23(e) did not require notice to members of a proposed class upon the denial of class certification. The Second Circuit also affirmed the summary dismissal of Fuller's retaliation claim on the ground that she failed to identify any adverse employment action. (Fuller did not appeal from the dismissal of any of her other individual claims).

REASONS FOR DENYING THE WRIT

There is no reason for this Court to squander its resources on any aspect of this case. First, the question whether former Federal Rule of Civil Procedure 23(e) required that notice of the denial of class certification be given to members of the rejected class is not an important issue of federal law that should now be settled by this Court because Rule 23(e) has, during the pendency of this case, been completely re-written, making the issue that Fuller presents for review one that has no ongoing significance. In any event, even if former Rule 23(e) remained in place, the Second Circuit's resolution of the notice question under former Rule 23(e) was the outcome mandated by the plain language and purpose of former Rule 23(e), settled law, and sound policy and did not give rise to a conflict in the circuits. Second, the conclusion that Fuller's statistical study was fundamentally flawed and lacked probative value because it failed to take into account any relevant non-discriminatory factors was, contrary to Fuller's contention, entirely consistent with U.S. Supreme Court precedent. Finally, Fuller's argument regarding the "impairment clause" of Section 1981(c) was never raised or consid-

ered below, lacks any legal foundation, and is nothing more than an effort to avoid the application of the well-settled requirement that an adverse employment action must be proved as an essential element of a claim of retaliation.

I

THERE IS NO IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW TO BE RESOLVED, AND NO CONFLICT BETWEEN THE CIRCUITS, AS TO WHETHER FORMER FEDERAL RULE OF CIVIL PROCEDURE 23(e) REQUIRED NOTICE OF THE DENIAL OF CLASS CERTIFICATION

A. Rule 23(e) No Longer Exists in the Form Under Which This Case Was Decided

Guidance is not needed from this Court on the applicability of former Federal Rule of Civil Procedure 23(e) in the event of a denial of class certification because Rule 23(e), as it existed when this case was before the District Court, was completely revised in a December 1, 2003 amendment. When class certification was denied in this action in 2001, and ten months later when Fuller first raised the supposed requirement of giving notice of the denial of certification to members of the rejected class, Rule 23(e) provided:

> Dismissal or Compromise
>
> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal and compromise shall be given to all members of the class in such manner as the court directs.

It is the requirements of this *former* Rule 23(e) that Fuller asks this Court to address in this case.

As amended effective December 1, 2003, Rule 23(e) now provides, in relevant part:

> Settlement, Voluntary Dismissal, or Compromise
>
> (1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

The language of former Rule 23(e) with respect to notice has obviously been replaced.

The question presented by Fuller for review by this Court with respect to former Rule 23(e) is one that has no current or future significance because it turns on the meaning of language that is no longer part of Rule 23. Neither litigants nor lower courts require direction from this Court regarding the proper application of a provision that was removed from Rule 23(e) in 2003. Rule 23(e), as it now reads, leaves no doubt that notice is not required after the denial of class certification.

This Court should not extend its discretionary jurisdiction to matters that, at best, are of historical interest.[1]

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[1] Consideration of the question whether former Rule 23(e) required notice of the denial of certification would not even be of any potential value to Fuller. Even if the Second Circuit and District Court had been mistaken in their reading of the plain language of former Rule 23(e), which they were not, there has never been any sug-

B. The Decision Below was Consistent with the Plain Language and Purpose of Former Rule 23(e), Settled Case Law, and Sound Policy

The plain language of former Rule 23(e) made clear, as the Second Circuit found, that notice did not have to be given upon denial of class certification. The only notice requirement in former Rule 23(e) was that "notice of the proposed dismissal or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." A District Court's denial of a motion for class certification clearly is not a "proposed dismissal or compromise."

Denial of class certification raises none of the concerns that animated the notice provisions of former Rule 23(e) and that evidently remain the rationale for Rule 23(e) in its current form. *See Glidden* v. *Chromalloy Am. Corp.*, 808 F.2d 621, 626-27 (7th Cir. 1986). ("Rule 23(e) was designed to prevent representative plaintiffs from settling or dismissing cases to the detriment of absent members of the class.") The judicial act of disallowing class certification presents no reason to question whether a representative plaintiff has allowed his or her own interests to come ahead of those of absent members of the putative class.

Given the clear language and purpose of former Rule 23(e), courts consistently held that notice was not man-

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gestion that it would be appropriate for notice to be given at this late date about a certification denial that occurred over three years ago. The applicable statute of limitations for claims of harassment, discrimination, and retaliation in New York is three years. N.Y. C.P.L.R. § 214(5); *Murphy* v. *Am. Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232. 233 (1983). As the most analogous New York State statute of limitations, the three-year limitation period also applies under Section 1981. *See Johnson* v. *Ry. Exp. Agency, Inc.*, 421 U.S. 454, 462 (1975). Under Title VII, the limitation period is, of course, even shorter. 42 U.S.C. § 2000e-5(e).

dated by former Rule 23(e) upon the denial of class certification. *See, e.g., Maddox & Starbuck, Ltd.* v. *British Airways*, 97 F.R.D. 395, 398 (S.D.N.Y. 1983) ("class certification is denied without notice to the putative class"); *Beaver Assocs.* v. *Cannon*, 59 F.R.D. 508, 510-11 (S.D.N.Y. 1973) ("[T]he Court disapproves of the use of this action as a class claim and the class allegations are hereby stricken. . . . It follows that since the claims asserted herein can appropriately be viewed only as individual, rather than representative, claims, the notice provisions cited above do not apply."); *Dolgow* v. *Anderson*, 53 F.R.D. 664, 690 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 437 (2d Cir. 1972) ("Since the dismissal of the class action aspect of the case is on the merits, no notice to prospective members of the class is required. . . . Subdivision (e) of Rule 23 . . . does not apply to noncollusive involuntary dismissals.") *See also* 7B C. Wright, A. Miller & Kane, Fed. Practice and Procedure § 1797 (2002) ("a dismissal on the ground that the suit is not maintainable as a class action does not fall under Rule 23(e)."); 4 Newburg on Class Actions (4th ed.) § 11.71 (1992) ("The notice requirement of Rule 23(e) would be inapplicable after a class denial ruling."). Fuller has not cited any case that held that former Rule 23(e) required notice following denial of class certification.

A requirement of notice following the denial of class certification would have far-reaching and problematic practical implications. It would mean that any time class certification was sought, however frivolously, and then denied, notice would have to be given to all of the individuals whom the plaintiff had proposed to represent. Such a rule would put a powerful means to menace in the hands of every disgruntled employee, prisoner, or anyone else willing to assert class allegations.

The act of giving notice of certification denial to members of a rejected class would also amount to a massive exercise of client solicitation by the plaintiff's counsel, with the court's imprimatur. The court's involvement in such a process would be unseemly. *See, e.g., Maddox & Starbuck, Ltd.*, 97 F.R.D. at 397 ("In determining whether notice should be given to putative class members when class certification has been denied, the Court will take care to avoid giving rise to barratry. . . ."); *Elias* v. *Nat'l Car Rental Sys., Inc.*, 59 F.R.D. 276, 277 (D. Minn 1973) ("Rule 23 does not require notice under these circumstances and to do so is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper.").

This Court should deny the Petition because the Second Circuit's decision that denial of class certification did not give rise to a notice obligation was consistent with the plain language and purpose of former Rule 23(e), settled case law under former Rule 23(e), and sound policy.

C. There is No Split of Authority in the Circuits Regarding Whether Former Rule 23(e) Required Notice to be Given of Denial of Class Certification

Contrary to Fuller's contention, the Second Circuit's decision regarding Rule 23(e) does not conflict with the Seventh Circuit's holding in *Culver* v. *City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002). In *Culver*, unlike this case, a class was certified and then decertified years later, prompting the dismissal of the action because the single named plaintiff's claim was moot. *Id.* at 910. In that context, the Seventh Circuit read a notice requirement into former Rule 23(e). That decision, while seemingly mistaken, does not conflict with the Second Circuit's holding in this case.

The Second Circuit in this case decided whether former Rule 23(e) mandated notice following a denial of class certification. By contrast, the Seventh Circuit in *Culver* decided whether former Rule 23(e) required notice of decertification of a class that had previously been certified.[2] Plainly the questions decided in the two cases were different, and their resolution required a distinct weighing of considerations, especially with regard to the possibility that absent class members were relying on the class representative to preserve and advance their claims.[3]

In any event, in view of the subsequent amendment of Rule 23(e), that makes explicit that notice is not required following either an initial denial of certification or a subsequent decertification of a previously certified class, any continuing validity of *Culver* has been undermined. Even if *Culver* had resolved the same issue under former Rule 23(e) as the Second Circuit below in a way that was inconsistent with the Second Circuit's holding, it would not be a reason to grant a writ of certiorari in this case because the holdings in both cases have been rendered irrelevant by the December 2003 amendment of Rule 23(e).

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[2] In contending that the Second Circuit's holding was at odds with *Culver*, Fuller actually depends on an over-reading of dicta in *Culver*, not on its holding. In a statement that was unnecessary to its resolution of the case, the *Culver* court opined that the "better view" is that "Rule 23(e) is applicable when a class action suit is dismissed before the class is certified." *Id.* at 914. A circuit split is not created by dicta.

[3] Fuller erroneously states in her Petition (Petition, p. 14, n. 12) that there was widespread knowledge among Instinet employees about the pendency of her action. In fact, the record contains no evidence that this case attracted any notoriety or that anyone within the scope of her proposed class was even aware of its pendency.

II

THE SECOND CIRCUIT'S HOLDING THAT A STATISTICAL ANALYSIS, THAT DID NOT ACCOUNT FOR ANY RELEVANT NON-DISCRIMINATORY FACTORS, LACKED PROBATIVE VALUE IN DEMONSTRATING DISCRIMINATION DID NOT CONFLICT WITH ANY DECISION OF THIS COURT

The necessity of proof of the existence of an aggrieved class as a threshold prerequisite to class certification in a discrimination case was made clear by this Court in *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 157-58 (1982):

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [a proposed class representative] to bridge that gap, he must prove much more than the validity of his own claim.

Statistical evidence, either alone or in conjunction with anecdotal evidence, is generally the means of demonstrating the existence of an aggrieved class in the class certification context. *See, e.g., Sheehan* v. *Purolator, Inc.*, 839 F.2d 99, 102 (2d. Cir. 1988); *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 596 (2d Cir. 1986).

To support her motion for class certification, Fuller presented the "Expert Report of Richard Faust," albeit

without ever actually contending expressly that it demonstrated the existence of an aggrieved class of "blacks and Hispanics and other minorities" at Instinet. The Report presented two statistical analyses of Instinet's workforce in the period from 1994 to 1999. The first showed that disparities existed between Whites and Blacks and between Whites and Hispanics with regard to their respective representation in certain EEO-1 occupational groups. Based on a chi-square test of statistical significance, the Report concluded that the observed disparities were "substantial and real (*i.e.*, not the result of chance or accident." Without identifying or controlling for any non-discriminatory factor that could reasonably have been anticipated as a potential cause of the disparities, such as education, length of service, work experience, or make-up of Instinet's applicant pool, the Report asserted that "In this case, since race is the source of the disparities, statistical significance would indicate that race, not accident or chance, was indeed the source."

The second statistical analysis looked at the average starting salary and the average "current" salary, by race, in four job groups. Using the t-test of statistical significance, the analysis concluded that the differences between the average "current" salaries of Whites and Blacks and of Whites and Hispanics were "real and meaningful" in three of the four job groups and were "slightly in favor of the minority employees" in the fourth job group.[4] With regard to the average starting

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[4] In analyzing "current" salaries, the Report actually used the last reported salary for the employees studied. This meant, for example, that the "current" salary of someone who left Instinet in 1994 was compared to the 2000 "current" salary of others who were still at Instinet when the study was undertaken. No adjustment was made for intervening changes in economic conditions and salary levels.

salary in each of the four job groups, by race, the analysis found an "overall pattern that was strikingly similar to that for current salaries." According to the Report, "[T]hese results show that racial disparities in salary against Black and Hispanic Instinet employees began when they initially assumed their current position and continue to the present time."

Like the District Court, the Second Circuit held that Fuller's "failure to include any relevant non-discriminatory factors in her statistical study left it without probative value" and thus made it insufficient to carry her burden under Federal Rule of Civil Procedure 23(a). Contrary to Fuller's current argument, that ruling does not conflict with this Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam).

In *Bazemore*, this Court held that it was error to reject regression analyses as proof of racial discrimination in salaries solely on the ground that the analyses did not include "all measurable variables thought to have an effect on salary level." *Id.* at 400. The Court stated that, because discrimination does not have to be proven with "scientific certainty," "it can hardly be said, absent some other infirmity, that an analysis which *accounts for the major factors* 'must be considered unacceptable as evidence of discrimination.' " *Id.* (emphasis added). Significantly, the statistical analyses at issue in *Bazemore*, that the Court accepted as adequate proof of discrimination, examined salary levels not only by race, but also by education, tenure, job title, and job performance, *i.e.*, the "major factors" that testimony in the case had identified as the ones that would normally be expected to influence salary level.

Nothing in *Bazemore* indicates that a finding of impermissible discrimination can be premised on statistical analyses, such as those presented by Fuller, that

accounted for *none* of the factors that might be anticipated to have had an influence on employees' salary levels or distribution across occupational categories. To the contrary, in *Bazemore*, this Court actually anticipated a case like this one when it noted that "There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant." *Id.* The statistical studies on which Fuller relied could not have been more "incomplete." The Second Circuit did not, as Fuller complains, require proof with "scientific certainty" here, but rather proceeded precisely in accordance with *Bazemore* in holding that Fuller's failure to include any relevant nondiscriminatory factors in her statistical analysis "left it without probative value" on the question of the existence of an assigned class.

Supreme Court review of the Second Circuit's decision that Fuller's statistical evidence lacked probative value should be denied just as review was recently denied in *Morgan* v. *United Postal Serv. of Am. Inc.*, No 04-1123, *cert. denied*, 2005 WL 420786 (U.S. Apr. 25, 2005). In *Morgan*, as here, a purported departure from *Bazemore* was cited as a reason to grant a writ of certiorari. Just as there was no conflict with *Bazemore* when the Eighth Circuit found in *Morgan* that "the flaws [in the statistical evidence presented] [were] too many and the probative value too slight for Plaintiffs' regressions to carry the day. . . .", 380 F.3d 459, 472 (8th Cir. 2003), there is no conflict in this case between *Bazemore* and the Second Circuit's holding that Fuller's statistical analysis was too incomplete to have probative value in demonstrating the existence of an aggrieved class of Blacks and Hispanics.

III

THE REQUIREMENT OF PROOF OF AN ADVERSE EMPLOYMENT ACTION IS A WELL-SETTLED ELEMENT OF A CLAIM OF RETALIATION THAT, UNTIL NOW, FULLER HAS NEVER CHALLENGED, AND SECTION 1981(c) HAS NO BEARING ON THE MATTER

A. Arguments Concerning Section 1981(c) Were Never Raised Before

Fuller seeks a writ of certiorari to review the test used by the Second Circuit at the summary judgment stage to determine the legal sufficiency of her retaliation claim. Fuller misleadingly contends that the Second Circuit "refused to follow" the language of Section 1981(c) and instead applied its own, too limiting criteria in affirming summary judgment on her retaliation claim. In fact, Fuller never even mentioned Section 1981(c) before the Second Circuit or in any prior proceedings in this case.

Until now, Fuller accepted the appropriateness of judging her retaliation claim by reference to the familiar test that requires proof of (1) protected activity; (2) an adverse employment action; and (3) a causal connection between the two. Predictably, therefore, the issues addressed by the parties and the courts below focused on whether Fuller could establish an adverse employment action and, if so, whether she could show a causal connection between it and her protected activity. All along, Fuller acknowledged that the tripartite test governed.

Fuller's new arguments based on Section 1981(c) reflect a major change of course in a desperate effort to salvage her retaliation claim. Issues that have not been raised, developed, and decided below should not be addressed by the Supreme Court in the first instance.

B. Section 1981(c) Does Not Set Forth Requirements for Stating a Claim for Retaliation

In her Petition, Fuller does not contest the Second Circuit's holding that she failed to identify any adverse employment action. Nor does Fuller contend that the Second Circuit erred in finding that her August 1999 performance review, on which she focused below in attempting to show an adverse employment action, did not qualify as an adverse employment action. Instead, her argument before this Court is that, under Section 1981(c), all she had to demonstrate to keep her retaliation claim alive was an "impairment," not an adverse employment action.[5] Under this new theory, Fuller presents her August 1999 review, no longer as an adverse employment action, but as something that caused her "impairment."

Fuller cites neither authority nor a rationale for recognizing Section 1981(c) as the statutory basis for a more lax standard for evaluating the sufficiency of retaliation claims under Section 1981. Nor could she. Section

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[5] Fuller's discussion of her performance reviews at Instinet is replete with misstatements and misrepresentations. She erroneously claims that it is uncontroverted that her reviews were uniformly excellent prior to August 1999. (Petition, p. 24). She misleadingly offers only a small excerpt from her August 1999 review that she describes as "extremely bad" and an equally small excerpt from the most recent prior one that she characterizes as "excellent." (Petition, pp. 24-25). She obscures the significant fact that both reviews postdated her protected activities. (Petition, p. 24). She omits to mention that her August 1999 review was accompanied by a bonus payment that she admitted she had no reason to believe had been diminished due to her review. She presents conjecture as if it were fact in stating the supposed effects of her August 1999 review on her advancement opportunities at Instinet and her ability to get a new job. (Petition, pp. 22, 24) She mistakenly states that it is uncontroverted that Instinet changed its policy of evaluation immediately after she brought her Title VII and Section 1981 actions. (Petition, p. 24).

1981(c) was added to Section 1981 as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), and has nothing to do with the elements required to state a cause of action for retaliation. Legislative history reflects that the reason for the addition of Section 1981(c) was to make explicit Section 1981's coverage of both public and private employers. *See* H.R. Rep. No. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630 (Section 1981(c) "confirms section 1981's coverage of both public and private sector employment"); H.R. Rep. No. 102-40(II), at 34 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 731 (Section 1981(c) "is intended to codify Runyon v. McCrary [where] the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. The Committee intends to prohibit racial discrimination in all contracts, both public and private."). Litigation under Section 1981(c) confirms that the subject matter of Section 1981(c) concerns the nature of the entities against which there is a direct right of action under Section 1981. *See, e.g.*, *Anderson* v. *Conboy*, 156 F.3d 167 (2d Cir. 1998); *Fed'n of African Am. Contractors* v. *City of Oakland*, 96 F.3d 1204 (9th Cir. 1996); *Brown* v. *United States*, 271 F. Supp. 2d 225 (D.D.C. 2003).

Fuller's argument regarding Section 1981(c) reflects a fundamental misunderstanding of the nature and purpose of Section 1981(c).

C. The Second Circuit Accurately Stated and Correctly Applied Settled Law on Retaliation

In affirming the summary dismissal of Fuller's retaliation claim, the Second Circuit adhered to the well-settled requirements for stating a retaliation claim under both Section 1981 and Title VII: proof of protected activity, a subsequent adverse employment action, and a

causal connection between the two. *See, e.g.*, *Davis* v. *Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004); *Ajayi* v. *Aramark Bus. Servs., Inc.* 336 F.3d. 520, 533 (7th Cir. 2003); *Bryant* v. *Aiken Reg'l Med. Ctrs, Inc.*, 333 F.3d. 536, 543-44 (4th Cir. 2003); *Cardenas* v. *Massey*, 269 F.3d 251, 263 (3d Cir. 2001). There is no claimed disagreement between the Circuits on the required elements of a claim for retaliation under Section 1981. No conflict has been asserted between the Second Circuit's approach to Fuller's retaliation claim and existing Supreme Court authority. There is no reason for this Court to consider the Second Circuit's entirely routine and proper articulation of the recognized elements of a cause of action for retaliation. As has been previously noted, the Supreme Court "make[s] poor use of judicial resources when, . . . [it] take[s] a case merely to reaffirm [without revisiting] settled law." *Powell* v. *Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting), citing, *Estelle* v. *Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), *United States* v. *Shannon*, 342 U.S. 288, 294-95 (1952) (opinion of Frankfurter, J.).

Equally, there is no reason for this Court to examine the Second Circuit's application of basic retaliation law to the particular facts of this case. The application of properly stated law to the facts of a particular case is rarely a matter for Supreme Court review. Supreme Court Rule 12. This case surely is not one of those rare cases in which such review might be appropriate because, as stated above, even Fuller does not argue before this Court that the Second Circuit erred in holding that she failed to identify any adverse employment action.

Nothing in the Second Circuit's straightforward and proper handling of Fuller's retaliation claim warrants Supreme Court review.

CONCLUSION

For the foregoing reasons, Fuller's Petition for a Writ of Certiorari is unfounded and should be denied.

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Respectfully submitted,

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